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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL F. ODOM,

Defendant and Appellant.

A098627

(Napa County
Super. Ct. No. 101214)

Michael F. Odom appeals a judgment sentencing him to probation for a period of five years, with a condition of one year in county jail, following convictions for driving under the influence of alcohol. We affirm.

PROCEDURAL BACKGROUND

An information filed on June 28, 2000, in Napa County charged appellant with two counts of driving under the influence of alcohol in violation of Vehicle Code section 23152, subdivision (a) and subdivision (b). It alleged that the offenses were punishable as a felony by reason of a prior conviction described in Vehicle Code section 23550.5. Appellant pled not guilty.

Prior to trial, appellant filed a motion in limine to exclude evidence of a preliminary alcohol-screening (PAS) test and requested a hearing under Evidence Code section 402, subdivision (b). The trial court denied the motion to exclude the evidence after conducting the requested hearing on the first day of trial.

Following two days of testimony, the jury found appellant guilty as charged. In a separate bifurcated proceeding, the trial court found the allegation pursuant to Vehicle Code section 23550.5 to be true. On March 22, 2002, the trial court suspended imposition of sentence and granted probation for a period of five years on the condition, among others, that appellant spend one year in county jail.

FACTUAL BACKGROUND

A California Highway Patrol officer, Brian Compton, testified that at 5:35 p.m. on April 11, 2000, he was driving south on a two-lane road in Napa County and saw a red Jeep traveling at an excessive rate of speed in the opposite direction. When he obtained a radar reading showing that the vehicle was traveling 78 miles per hour in a 55-miles-per-hour zone, he made a U-turn and activated his overhead lights. The vehicle stopped by turning into a driveway. Officer Compton identified appellant as the driver of the vehicle.

As he approached the window of the driver's seat, officer Compton smelled the odor of alcohol and saw an open 24-ounce bottle of beer on the floor. He asked appellant if he had anything alcoholic to drink. Appellant replied that he drank a 24-ounce can of beer approximately an hour earlier at 4:30 p.m. Officer Compton observed that appellant's speech was low and slurred and his eyes red and watery and that he was unsteady on his feet as he left the vehicle. He asked appellant a standard series of questions to assess his physical condition and then administered five field sobriety tests intended to measure motor control and mental concentration. Appellant did poorly on all the tests.

Following the field sobriety tests, officer Compton asked appellant to perform two preliminary alcohol screening device tests. The first test, performed at 5:47 p.m. indicated a blood-alcohol content of 0.101; the second test performed at 5:49 indicated a blood-alcohol content of 0.102. Officer Compton then arrested appellant and took him to the Napa County Detention Center. Upon being told he was required to take a blood-alcohol test, appellant chose to take a breath test using an Intoxilyzer 5000. Before administering the test, officer Compton observed appellant for 15 minutes. Appellant

provided his first breath sample at 6:33, which showed a blood-alcohol content of 0.09. A second breath sample registered as invalid on the machine. A third breath sample given at 6:35 again indicated a blood-alcohol content of 0.09.

Two other witnesses presented testimony supporting the reliability of the two breath tests. Officer Warren Bullis testified that he was responsible for maintenance and calibration of PAS devices in the Napa area. He had tested the PAS device used in appellant's test on April 7, 2000, and again on April 14, 2000, and found that it was working properly. A criminalist, Michael Potts, testified concerning the accuracy and significance of blood-alcohol testing. In his opinion, the blood-alcohol test results at the county detention center confirmed the field observations and PAS test taken an hour earlier.

In his defense, appellant presented the testimony of a forensic toxicologist, Jeffrey Zehnder, who explored possible inaccuracies and uncertainties in the two breath tests and the field sobriety tests.

DISCUSSION

In his only assignment of error, appellant maintains that the trial court erred in denying his motion to exclude the results of the PAS tests. The motion in limine objected to the admission of this evidence on multiple grounds, including noncompliance with California Code of Regulations, title 17, section 1215 et seq., lack of foundation under *People v. Adams* (1976) 59 Cal.App.3d 559, and the discretionary authority under Evidence Code section 352 to exclude time-consuming, prejudicial, confusing, and misleading evidence. In this appeal, appellant now argues only that the trial court abused its discretion in failing to exclude the evidence under Evidence Code section 352.

1. Standard of Review

Evidence Code section 352 confers on the trial court discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "Evidence is substantially more prejudicial than probative [within the meaning of section 352] if,

broadly stated, it poses an intolerable ‘risk to the fairness of the proceedings or the reliability of the outcome’ [citation].” (*People v. Waidla* (2000) 22 Cal.4th 690, 724.)

“Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion ‘must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]’ [Citation.]” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)¹

2. Legal Background

Under Vehicle Code section 23612, subdivision (a), any person who drives a motor vehicle is deemed to have given consent to chemical testing of his blood or breath for the purpose of determining his blood-alcohol content, if lawfully arrested for violation of Vehicle Code section 23152. In addition, section 23612, subdivision (h), authorizes an officer at the scene of the investigation to use a preliminary alcohol-screening test, or PAS test, which will indicate the “concentration of alcohol based on a breath sample in order to establish reasonable cause to believe the person was driving a vehicle in violation of Section . . . 23152 [The PAS test is to be used as] a field sobriety test and . . . as a further investigative tool.” It does not satisfy a person’s obligation to submit to a chemical or blood test under the implied consent law, and before administering the PAS test, an officer “shall advise the person [under investigation] of that fact and of the person’s right to refuse to take the [test].” (Veh. Code, § 23612, subd. (i).)

¹ In his opening brief, appellant complains that the trial court did not “formally balance” the probative and prejudicial effects of the evidence, apparently suggesting that the court must make a formal statement on the record balancing the probative value of the evidence against its prejudicial impact. Though language in certain early cases can be read as supporting appellant’s position, it is now established that the trial court is not required “to place on the record the process by which it concluded that the probative value of the evidence outweighed its prejudicial impact, . . .” (*People v. Catlin* (2001) 26 Cal.4th 81, 122; *People v. Waidla, supra*, 22 Cal.4th 690, 724, fn. 6; *People v. Mickey* (1991) 54 Cal.3d 612, 656.)

As explained in *People v. Bury* (1996) 41 Cal.App.4th 1194, 1201, a PAS test is not a new scientific procedure that would require a *Kelly/Frye* hearing to establish the admissibility of the test results. In fact, “[b]reath tests to determine blood-alcohol concentration have long been recognized by decisional law in California as scientifically valid.” (*Id.* at p. 1201.) For more than 25 years, the administration of breath-alcohol tests has been regulated by California Code of Regulations, title 17, section 1221 et seq.

The leading decision on the admission of breath test evidence, *People v. Adams* (1976) 59 Cal.App.3d 559, authorized the admission of test results upon a showing of compliance with the title 17 regulations (*People v. Adams, supra*, at p. 567) or, alternatively, upon proof of three foundational prerequisites: “(1) the particular apparatus utilized was in proper working order, (2) the test used was properly administered, and (3) the operator was competent and qualified.” (*Id.* at p. 561.) In *People v. Williams* (2002) 28 Cal.4th 408, the court followed the *Adams* decision in upholding the admission of test results from use of a PAS device. Though there was evidence of noncompliance with certain title 17 regulations, the court held that the trial court acted within its discretion in admitting the test results in view of evidence supporting a finding that the alternative foundational prerequisites for admission of the test were satisfied. (*People v. Williams, supra*, at p. 417.) Noncompliance with the regulations affected “the weight of the evidence, not its admissibility.” (*Id.* at p. 414.)

In this appeal, appellant does not contest the admissibility of the PAS test results under the *Adams-Bury-Williams* line of decisions. He maintains only that the trial court abused its discretion in refusing to exclude the evidence under Evidence Code section 352 on the ground that its probative value was substantially outweighed by the probability of prejudice. He notes that the *Williams* decision did not present an issue under section 352 since the defendant refused the implied-consent tests and the PAS test was therefore the only evidence of blood-alcohol content. In contrast, the PAS test here was duplicative and subject to a proper objection in appellant’s in limine motion.

Appellant argues that the admission of the PAS test results was highly prejudicial because it appeared to confirm the testing at the county detention center, which indicated

a marginal level of intoxication. He maintains that the test results in fact were cumulative evidence that had minimal corroborative value because the results were subject to a much higher range of inaccuracy than the later testing of appellant's breath sample at the detention center. The defense expert testified that the PAS device was routinely subject to a 0.02 range of inaccuracy and could be still more inaccurate where the breath sample was contaminated with mouth alcohol. Unlike the Intoxilyzer 5000 used at the detention center, the PAS device lacked a function known as a "slope detector" designed to identify misleading test results due to mouth alcohol. The presence of an open beer can raised the possibility of such contamination, despite appellant's denial of having consumed alcohol in the previous hour, as did the invalid test at the detention center. On the arresting officer's own admission, the PAS test was administered in a more informal manner than the later Intoxilyzer 5000 test.

The prosecution, however, presented other evidence tending to support the probative value of the PAS test result. An expert witness, Michael Potts, testified that the two breath tests indicated a declining level of blood alcohol, reflecting the liver's ability to eliminate alcohol from the blood, which was consistent with appellant's own account that he had consumed alcohol an hour earlier in San Francisco. In his opinion, the PAS test tended to corroborate the other evidence of intoxication -- the field sobriety tests and the laboratory testing at the detention center. The invalid test at the detention center could not have been the result of mouth alcohol because a further test, performed within a minute, confirmed the first test result.

On this record, we see no basis for finding that the trial court abused its discretion in overruling appellant's objection based on Evidence Code section 352. The objection was essentially based on the supposition that the test results may have been contaminated by mouth alcohol. The trial court could reasonably accept evidence rebutting this claim. In the exercise of its discretion, the court was free to give credence to the prosecution's expert testimony, particularly in light of the fact that this testimony was consistent with appellant's own statements at the time of the field investigation.

The judgment is affirmed.

Swager, J.

We concur:

Marchiano, P. J.

Stein, J.